Federal Court  Cour fédérale

Date: 20130801

Docket: IMM-4498-12

Citation: 2013 FC 843

Ottawa, Ontario, August 1, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

MARIA ANGELICA GIL AGUILAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division (the Board), dated April 16, 2012, wherein the applicant was determined to be neither a Convention refugee within the meaning of section 96 of the Act nor a person in need of protection as defined in subsection 97(1) of the Act.

[2] The applicant requests that the Board's decision be set aside and the application be referred back to the Board for redetermination by a different panel.

Background

[3] The applicant is a citizen of Colombia. In February 2006, the Revolutionary Armed Forces of Colombia (FARC) attempted to recruit her in her neighbourhood in Bogota to commit various criminal acts. She refused and her parents sent her to live with her aunt in the suburbs. After her aunt and uncle fled Colombia, she moved to live with a different aunt. After that aunt also left the country, she returned to live with her parents in October 2007 and hoped her neighbourhood would be safe.

[4] In December 2007, she was again approached by members of FARC. They assaulted the applicant and threatened to kill the applicant and her family. They told her the FARC never forgets and never forgives. The applicant immediately made plans to leave the country for the United States on a student visa. She arrived in the U.S. in February 2008, where her aunt and uncle consulted lawyers who told them the applicant could not make a refugee claim there. She ultimately followed their advice and left the U.S. to make a refugee claim in Canada. She claimed protection at the border on January 21, 2009.

[5] She has since learned that her father was attacked and beaten in Cali and the attackers told him it was because the applicant did not join the FARC.

Board's Decision

[6] The Board's decision, dated April 16, 2012, begins by summarizing the allegations described above. The Board accepted the applicant's identity but rejected the claim on four separate grounds: lack of nexus, generalized risk, state protection and internal flight alternative (IFA).

[7] The Board found that the FARC has a political purpose, but this is secondary to its criminal purpose. In this case, the FARC was attempting to recruit the applicant for criminal purposes. The applicant's rejection of those attempts were based on her disagreement with the criminality of the FARC, not their political ideology. The Board, relying on the National Documentation Package (NDP), found that the FARC is primarily a criminal organization. The Board held that the applicant was a victim of criminality and was not pursued for political views.

[8] The Board rejected counsel's submission that the applicant was a member of a particular social group: young Colombians seen to be prominent in their own community coming from poor families. The Board found, based on country conditions evidence, that the FARC widely recruit youth. The Board rejected the applicant's claim that she was well known in her community due to a lack of probative corroborating evidence.

[9] The Board determined that the applicant's profile fit into one of the large subgroups that FARC generally recruit: children, adolescents and young people. The evidence did not establish the FARC pursued the applicant for any reason other than being a young female who could be enticed with the offer of money.

[10] The Board acknowledged the testimony that the applicant's parents had been targeted by the FARC and referred to country conditions evidence that it was common for businesses to be extorted and for the FARC to engage in extortion demands from family members out of vendetta for non-compliance.

[11] Noting that neither a fear of criminal acts nor a personal vendetta constitutes a nexus to a Convention ground, the Board rejected the claim under section 96 of the Act.

[12] The Board next considered generalized risk per subparagraph 97(1)(b)(ii) of the Act. The Board noted that where the general public is subject to a risk of crime, the fact that some individuals are more exposed to the risk does not necessarily mean an applicant qualifies under section 97, even if she is a direct victim of crime.

[13] The Board accepted that the applicant had been approached by the FARC and that minors are still being actively recruited by the FARC in its current form of a predominantly criminal organization. The applicant was a victim of attempted recruitment, but this is a crime faced generally by many other young Colombians.

[14] The Board determined the applicant's fear is a generalized one. The risk of recruitment by FARC is a widespread risk for young citizens of Colombia.

[15] The Board went on to consider the alternative grounds of state protection and IFA. On the first ground, the Board found that Colombia is a multiparty democracy where civilians have

recourse to security forces to protect them. The Board noted the 45 year armed conflict between the government and FARC and the resultant human rights abuses by both sides. The Board noted progress in combating guerrilla groups, as kidnappings and mass killings decreased. FARC has suffered serious setbacks and has been pushed out of urban centers and many regions where it was previously strong. The number of murders committed by illegal groups had declined by 2.2 percent from 2008 to 2009. FARC's presence is felt primarily in southeast Colombia.

[16] The Board described institutions to protect victims of criminality of the FARC, such as the Ministry of National Defence, the National Fund for the Defence of Individual Freedom and others. The Board indicated it had considered a Canadian Council for Refugees (CCR) report describing how demobilization of paramilitaries has led to armed gangs in urban areas, as well as the murders of internally displaced persons. The security situation in Bogota had improved but the city still had a high level of homicides and criminal acts. There were also accounts indicating the city had successfully been made safe to live in.

[17] The Board concluded that although there were inconsistencies in the country conditions evidence, the state of Colombia provides adequate protection to victims of crime. The Board also noted the applicant had never sought state protection. The applicant failed to rebut the presumption of state protection.

[18] The Board then turned to the matter of IFA. The applicant had been asked whether she could avoid the FARC by living in Cali or Cartagena. She said she would not be safe in Cali because her father had been assaulted there and that it is not difficult to find people in Colombia.

The Board found that an IFA was available in either city, since the FARC would not consider her a high value target. While the applicant was under age when approached by the FARC, she was twenty at the time of the Board's decision. State protection would be available in Cali or Cartagena and it would not be unreasonable for the applicant to move there.

Issues

[19] The applicant submits the following points at issue:

1. Were the Board's findings regarding nexus and generalized risk unreasonable in that they were made without regard to the evidence before it?

2. Was the Board's analysis and conclusion regarding state protection unreasonable?

3. Was the Board's analysis and conclusion regarding availability of IFA unreasonable?

[20] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Board err in rejecting the applicant's claim?

Applicant's Written Submissions

[21] The applicant argues the first error committed by the Board was the finding that there was no evidence regarding the applicant's involvement in community activism. However, the Board made no adverse credibility finding against the applicant and it was therefore not open to the Board

to require corroboration of the applicant's sworn testimony. Since the Board discounted the applicant's community work, it did not properly assess the reasons for her attempted recruitment by the FARC.

[22] The applicant argues the Board failed to mention or analyze the United Nations High Commissioner for Refugees (UNHCR) Guidelines which state that children subject to recruitment by armed groups may constitute a particular social group. To fail to consider this argument is a reviewable error.

[23] The applicant submits that the Board's finding on generalized risk was based on the NDP but did not offer a particular reference. This finding flies in the face of much of the evidence in that package. The Board failed to make a proper individualized inquiry into the applicant's circumstances, given that she was specifically targeted by the FARC.

[24] The applicant argues the Board's state protection analysis contained the same error of ignoring the particularly high risk of children subject to recruitment. The members of a particular group may still have grounds for fearing persecution even if the state is capable of protecting citizens generally. The Board ignored the CCR report which found in substance that state protection in Colombia was inadequate for threatened persons. It was open to the Board to weigh the evidence but not to misstate the report's conclusion.

[25] The Board's analysis of IFA suffered from similar defects and failed to acknowledge that the applicant's father had been attacked in Cali by FARC members, constituting a failed attempt at

an IFA. The Board relied on a 2009 report for the conclusion that the FARC's support had vanished in cities, while ignoring the 2011 CCR report indicating guerrillas operated with great success in cities.

Respondent's Written Submissions

[26] The respondent argues the Board did not err in its determination on lack of nexus. The FARC is a criminal organization and recruited the applicant for criminal purposes. The FARC targets vulnerable people, but being a victim of crime does not have a nexus with a Convention ground. The Board reasonably concluded the applicant did not have a profile of particular interest to the FARC. The UNHCR eligibility guidelines had no application as it is not evidence the recruitment had any relationship to her being a child. The applicant is no longer a minor, so the Board properly assessed her risk as that of an adult.

[27] On generalized risk, the Board reasonably concluded the risk faced by the applicant was not greater than the risk faced by the population at large and specifically other young people. The risk of FARC recruitment is a widespread risk for young people of Colombia and risk of criminality is general and felt by the population at large.

[28] The respondent argues the state protection was reasonable, as the Board acknowledged the conflict and the presence of guerrilla groups but noted the progress made by Colombia. The FARC is an organization under severe stress and Colombia's national security is no longer threatened.

[29] The Board did not misstate the CCR report and the applicant's argument merely amounts to a complaint with the Board's assessment of the evidence. The Board accepted inconsistencies among country conditions sources but concluded there was adequate state protection. It was open to the Board to prefer some evidence to other evidence. The Board did not err in determining the applicant had failed to seek state protection. The Board correctly noted the applicant was a minor when she was approach by the FARC, but this is no longer the case.

[30] The Board considered that the applicant's father was assaulted in Cali when contemplating IFA. The Board found the applicant would not be a high value target for the FARC.

Applicant's Further Written Submissions

[31] The applicant argues although victims of crime may be frequently unable to demonstrate a link to a Convention ground, the Board still had an obligation to consider the applicant's profile and the Board erred in requiring corroborating evidence. Although the applicant is no longer a child, the Board ought to have considered her membership in a particular social group based on unalterable historical status, as a former child recruiting target of the FARC.

[32] The applicant argues the respondent has misstated the law concerning personalized risk as opposed to generalized risk. A person who is specifically and personally targeted is entitled to protection under section 97.

Analysis and Decision

[33] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[34] It is established jurisprudence that credibility findings, described as the "heartland of the Board's jurisdiction", are essentially pure findings of fact that are reviewable on a reasonableness standard (see *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paragraph 7, [2003] FCJ No 162; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 46, [2009] 1 SCR 339; *Demirtas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 584 at paragraph 23, [2011] FCJ No 786). Similarly, the weighing of evidence and the interpretation and assessment of evidence are reviewable on a standard of reasonableness (see *Oluwafemi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045 at paragraph 38, [2009] FCJ No 1286).

[35] In reviewing the Board's decision on the standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; *Khosa* above, at paragraph 59). As the Supreme Court held in *Khosa* above, it is

not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[36] **Issue 2**

Did the Board err in rejecting the applicant's claim?

As for the applicant's initial argument that children subject to unsuccessful recruitment constitute such a group, the refugee definition is forward looking and therefore the applicant cannot be protected based on membership in a group she is no longer a part of.

[37] I also do not see the relevance of the Board's negative consideration of the evidence of the applicant's community activities, given that the Board ultimately believed the applicant's allegation that the FARC had attempted to recruit her.

[38] On the subject of generalized risk under section 97 of the Act, I adopt the approach described by Madam Justice Mary Gleason in *Portillo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 678, [2012] FCJ No 670. After a review of recent case law on the subject, she described the appropriate method for generalized risk analysis at paragraphs 40 and 41:

> 40 In my view, the essential starting point for the required analysis under section 97 of IRPA is to first appropriately determine the nature of the risk faced by the claimant. This requires an assessment of whether the claimant faces an ongoing or future risk (i.e. whether he or she continues to face a "personalized risk"), what the risk is, whether such risk is one of cruel and unusual treatment or punishment and the basis for the risk. Frequently, in many of the recent decisions interpreting section 97 of IRPA, as noted by Justice Zinn in *Guerrero* at paras 27-28, the "... decision-makers fail to actually state the risk altogether" or "use imprecise language" to describe the risk. Many of the cases where the Board's decisions have been overturned involve determinations by this Court that the

> Board's characterization of the nature of the risk faced by the claimant was unreasonable and that the Board erred in conflating a highly individual reason for heightened risk faced by a claimant with a general risk of criminality faced by all or many others in the country.
>
> 41 The next required step in the analysis under section 97 of IRPA, after the risk has been appropriately characterized, is the comparison of the correctly-described risk faced by the claimant to that faced by a significant group in the country to determine whether the risks are of the same nature and degree. If the risk is not the same, then the claimant will be entitled to protection under section 97 of IRPA. Several of the recent decisions of this Court (in the first of the above-described line of cases) adopt this approach.

[39] In this case, the Board accurately described the risk alleged by the applicant, in noting that she had testified that she feared she would be harmed by the FARC for not having obeyed their demands to join their gang (at paragraph 23 of the Board's reasons). While the Board at times describes the risk more generically as the risk of crime, the first step in Justice Gleason's approach is satisfied.

[40] The Board, however, did not properly compare this risk with that faced by the population generally. It describes recruitment by the FARC, or attempted recruitment, as a widespread crime in Colombia and a risk faced by many young Colombians (at paragraph 26). Yet this is not the same risk, in "nature and degree", to use Justice Gleason's words, as the risk as retribution for spurning recruitment. The Board never considered whether the risk of retribution was generalized in Colombia. This is an error.

[41] Additionally, while personal targeting is not necessarily determinative of personalized risk (as I explained in *De Munguia v Canada (Minister of Citizenship and Immigration)*, 2012 FC 912 at

paragraphs 25 to 39, [2012] FCJ No 986), the Board made no mention in its generalized risk analysis that the applicant alleged her father had been assaulted by the FARC as retribution for her rejection of recruitment. This would put the Board's decision into the category of cases described by Justice Gleason at paragraph 39 of *Portillo* above, where personal targeting was not considered in the risk analysis.

[42] Although the Board's finding on section 97 was unreasonable, I must also consider the Board's analysis of state protection and IFA.

[43] The applicant argues that the Board misrepresented the content of the CCR report, which found that state protection in Colombia was inadequate. While the applicant may disagree with the Board's conclusion, it noted many of the negative findings of the CCR report, including the killing of internally displaced persons in Bogota, the presence of "neo paramilitaries" in urban areas and the ability of guerrilla groups to pursue victims in many regions of the country.

[44] It is not a reviewing court's role to reweigh the evidence and the Board's analysis of the CCR report makes clear that it thoroughly considered this evidence. There is therefore no basis on which to disturb the state protection finding.

[45] On IFA, the applicant argues the Board failed to consider that her father was assaulted in Cali after her parents attempted an IFA there. I agree. While the Board mentioned this submission (at paragraph 52), there is no analysis of this evidence, which is surely relevant to the availability of an IFA.

[46] That being said, a finding of state protection is determinative of a claim. Therefore, the application for judicial review must be dismissed.

[47] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT

SOLICITORS OF RECORD

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